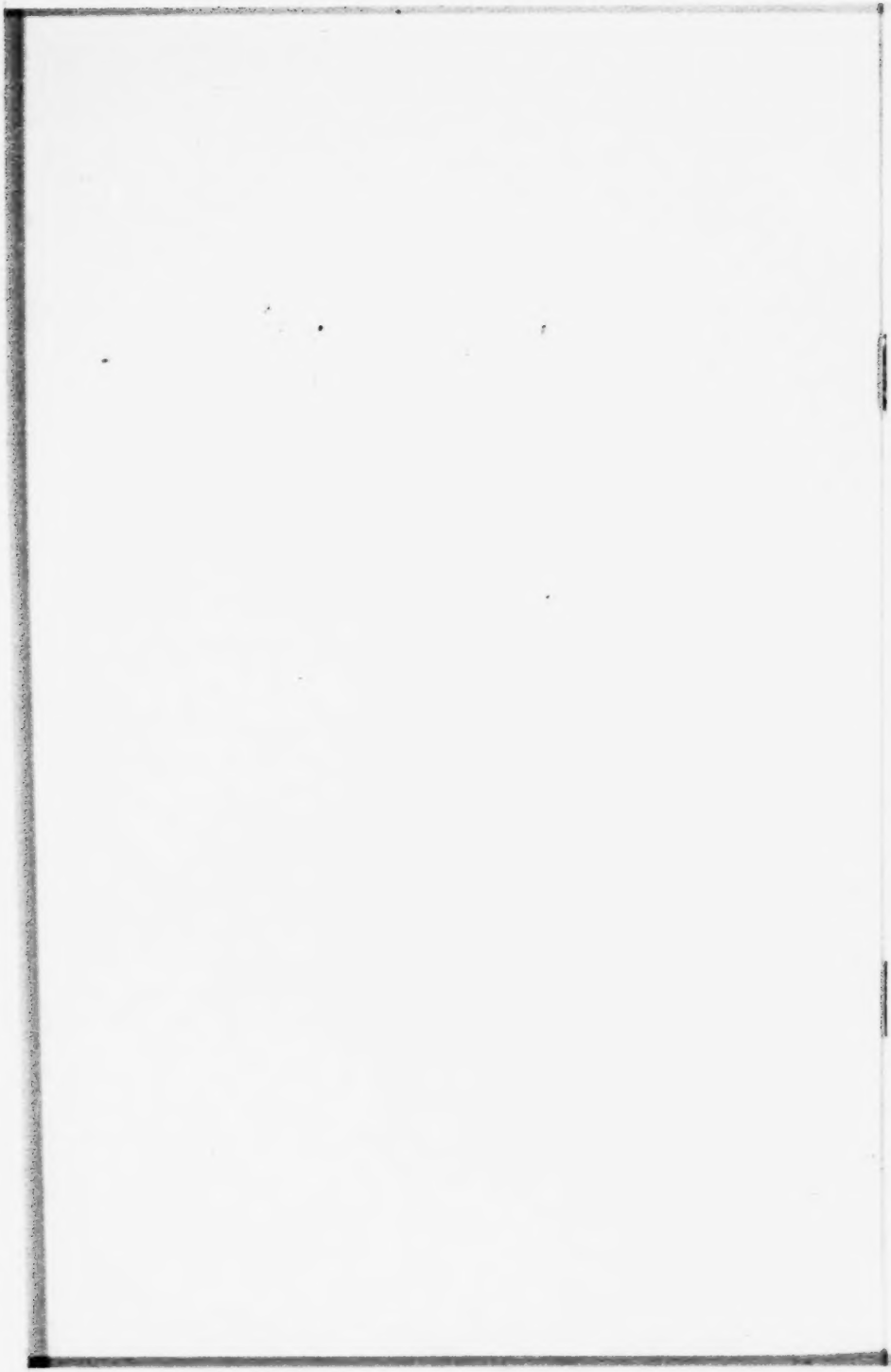

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

NO. 73-288

ROBERT N. PRATT,

Petitioner

vs.

STATE OF ALABAMA,

Respondent

BRIEF AND ARGUMENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

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BRIEF AND ARGUMENT FOR RESPONDENT

I

OPINIONS OF THE COURT BELOW

The opinion of the Court of Criminal Appeals of Alabama is reported as follows:

Robert N. Pratt v. State of Alabama, 6th Division 302, 278 So. 2d 724. Certiorari was denied, 278 So. 2d 729.

II

JURISDICTION

The petitioner has applied for a writ of certiorari from the Supreme Court of the United States to review the judgment of the Court of Criminal Appeals of Alabama rendered March 20, 1973. Application for rehearing the Court of Criminal Appeals of Alabama was denied on April 17, 1973. A petition to the Supreme Court of Alabama for writ of certiorari was denied on May 24, 1973. Petitioner applies under the provisions of Title 28, Section 1257(3), United States Code.

III

QUESTIONS PRESENTED

1. Was petitioner denied his Fourteenth Amendment rights when the Court failed to exercise the power to compel an election where only one offense was charged?

2. Was overruling motion for continuance violative of constitutional rights of accused on his motion for new trial even though there was a period of one hundred and six days from the time of filing motion to hearing in which to interview witnesses?

IV

CONSTITUTIONAL PROVISION INVOLVED

Section 1 of the Fourteenth Amendment to the Constitution of the United States.

V

STATEMENT

The District Attorney filed an information in the Circuit Court of Jefferson County charging petitioner with unlawfully practicing law after having previously surrendered his license. The information is set out on A-1 and A-2 of Appendix to petitioner's brief. Demurrer was filed and overruled. At the beginning of the trial petitioner orally moved to require the State to make an election under which Section of Title 46 of the Code (31 or 42) and advise petitioner. Motion was overruled (R. p. 18). After jury trial, verdict and sentence, petitioner filed motion for new trial on July 6, 1971, heard and overruled on October 20, 1971. At the hearing on October 20, 1971, petitioner moved for a continuance in order to interview various jurors concerning an alleged quotient verdict. Motion was overruled (R. p. 181).

VI

SUMMARY OF ARGUMENT

Overruling of motion to require the State to make an election was not error and did not violate constitutional rights of petitioner where only one offense was charged and where ruling was pursuant to the State law and procedure.

The overruling motion for a continuance during hearing on motion for new trial, using State law and procedure, was a discretionary ruling by the trial judge and did not raise a federal or constitutional question to support the jurisdiction of this Honorable Court.

VII

ARGUMENT

Petitioner, a white disbarred attorney, argues in his brief that his constitutional rights were violated when the State of Alabama failed to elect under which Alabama statute it prosecuted him.

Under Article 1 of Chapter 3 of Title 46, Recompiled Code of Alabama 1958 are found Sections 21 through 61 dealing with "Organization, etc. of State Bar; License and Practice".

Section 31 of Title 46 is set out on page A-2 of petition and is adopted herein by reference.

Section 42 of Title 46, Recompiled Code of Alabama 1958 provides in part as follows:

> "Only such persons as are regularly licensed have authority to practice law. For the purposes of this article, the practice of law is defined as follows: . . . . ."

In the opinion of the Court of Criminal Appeals of Alabama in *Robert N. Pratt v. State*, 278 So. 2d 724, the Court held:

> "There is no conflict between §§ 31 and 42, supra, in their application to the transaction set forth in the information. Only one transaction of illegal practice is charged in the information. This transaction is prohibited by both §§ 31, and 42, supra, with punishment therefor fixed by the amendatory Act of 1949, supra. We fail to see that the defendant was not fully informed of

the transaction for which he was being prosecuted. There was no occasion for an election on the part of the State between the two prohibitory laws. The only difference is that § 42 is more definitive than § 31. The information is sufficiently definitive of the involved transaction to meet the requirements of the law. In *Broom v. State*, 197 Ala. 419, 73 So. 35 (10), the Supreme Court of Alabama observed as follows:

> "'. . . The court will not exercise the power to compel an election unless it appears either from the indictment or the evidence that an attempt is made to convict the accused of two or more offenses growing out of separate and distinct transactions. *Mayo v. State*, 30 Ala. 32; *Wooster v. State*, 55 Ala. 217.' . . ."

Both the demurrer and the motion to require the State to elect were properly overruled."

In the case at hand there was no error in overruling petitioner's motion for an election and no denial of a constitutional right because the petitioner was being tried for only one offense growing out of one distinct act, namely, that he unlawfully practiced law after surrendering his license in the obtaining of a divorce for Sherry Morris.

The matter of the correct section of the Code setting out the offense was argued in the case of *John Ike Griffith v. State*, 255 So. 2d 48, cert. denied 405 U.S. 1042, 31 L. Ed. 2d 583, 92 S. Ct. 1317 and ruled adversely to petitioner.

The question of legislative intent as expressed in the enactment of these Code sections is to be considered.

United States v. Lacher, 134 U. S. 624, 10 S. Ct. 625, 33 L. Ed. 1080 held:

> "The rule that statutes of this class are to be construed strictly is far from being a rigid or unbending one; or rather, if it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment; the courts refusing, on the one hand, to extend the punishment to cases which are not clearly embraced in them, and, on the other, equally refusing by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope."

The question of the Court's failure to exercise the power to compel an election is based upon state procedure, involves no federal question and does not support this Honorable Court's jurisdiction.

This Honorable Court has held that where a decision is based upon a matter of practice, by a State court under State procedure, it does not draw in question any right the complainant has under the Constitution or laws of the United States. *Thorington v. City Council of Montgomery*, 147 U. S. 490, 13 S. Ct. 394.

Petitioner contends that he was denied his constitutional rights to equal protection of the law under the Fourteenth Amendment when the trial Court denied his motion for a continuance to interview various jurors. This contention is without merit. Both State and Federal Courts have consistently held that the granting or refusal of a continuance is discretionary subject to reversal only upon a showing of gross abuse of such discretion.

Granting or refusing the continuance was within the discretion of the trial Court. *Butler v. State*, 285 Ala. 387, 232 So. 2d 631.

In the case now before this Honorable Court the basis of the motion for a continuance was that he needed time to interview certain jurors. Respondent calls the Court's attention to the fact that the motion for new trial was filed on July 6, 1971 and was not heard until October 20, 1971, some 106 days later.

In *Burton v. State*, 187 So. 2d 808 the Court held:

> "Whether time allowed counsel for a defendant for preparation for trial is sufficient depends upon the nature of the charge, the issues presented, counsel's familiarity with the applicable law and pertinent facts, and the availability of material witnesses. *Ray v. United States*, 197 F. 2d 268 . . . "

Here petitioner had filed the motion raising certain grounds. He knew the names and whereabouts of witnesses, etc. 106 days was certainly adequate time for preparation for a hearing on motion for new trial.

Respondent submits further that the above contention does not raise a Federal question. It involves State procedure and does not draw in question any right under the Constitution and laws of the United States and certainly no denial of due process resulted from the overruling of the motion for continuance.

VIII

CONCLUSION

For the foregoing reasons, respondent submits that the petitioner was indicted, tried, convicted and sentenced prop-

erly, and that due process or equal protection of the law clause of the Fourteenth Amendment to the Constitution of the United States was not violated in the trial of the petitioner. Therefore, the writ of certiorari should be denied.

Respectfully submitted,

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IX

CERTIFICATE

I, David W. Clark, one of the attorneys for Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 6 day of September, 1973, I served three copies of the foregoing brief and argu-

ment on one of the attorneys for Petitioner, by mailing said copies in a duly addressed envelope to said attorney of record, as follows:

TO: Honorable William B. McCullough, Jr.
910 Frank Nelson Building
Birmingham, Alabama 35203

David W. Clark

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